BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PENNY LUMBLEY	)	
Claimant	)	
	)	
VS.	)	
	)	
STATE OF KANSAS	)	
Respondent	)	Docket No. 264,185
	)	
AND	)	
	)	
STATE SELF INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the May 10, 2006 Award by Special Administrative Law Judge (SALJ) Marvin Appling.[1] The Board heard oral argument on August 8, 2006.

APPEARANCES

Kala A. Spigarelli, of Pittsburg, Kansas, appeared for the claimant. William L. Phalen, of Pittsburg, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument the parties agreed that in the event the Board concluded claimant's claim was compensable, that the SALJ's findings with respect to the nature and extent of claimant's impairment and causally related medical expenses are to be affirmed in all respects.

[1] Marvin Appling was appointed as a Special ALJ for this case on April 7, 2006.

ISSUES

Claimant fell on a patch of ice on a city sidewalk while walking into work one morning. The SALJ concluded claimant's injury arose out of and in the course of her employment and awarded her a 20 percent impairment to her right lower leg for her broken ankle. He also awarded the claimant 23 weeks of temporary total disability compensation and payment of her medical bills in the amount of $16,405.01.

The respondent requests review of this decision alleging claimant's injury occurred while she was on her way to work. Thus, her claim is precluded by the "going and coming" rule as set forth in K.S.A. 44-508(f) and should be reversed.

Alternatively, assuming this claim is found compensable respondent argues that the claimant failed to establish her entitlement to the 23 weeks of temporary total disability benefits (ttd) awarded by the SALJ. Respondent further argues claimant failed to establish precisely when her fringe benefits ceased and therefore, the SALJ improperly included additional monies in the average weekly wage calculation beyond her base wage of $10.81 per hour.

Claimant argues that she was attempting to complete a work errand when she was injured and therefore was in the course of her employment and is entitled to worker's compensation benefits. Accordingly, the SALJ's Award, including the ttd and average weekly wage issues, should be affirmed in all respects.

The issues to be decided in this appeal are whether claimant's accidental injury arose out of and in the course of her employment, and if that issue is resolved in claimant's favor, her average weekly wage and her entitlement to ttd benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant is a state employee who worked as court clerk for the Montgomery County District Court, which is located in a city office building. Neither the state nor the county owns or maintains this building or its surrounding sidewalks. It is uncontested that claimant was paid $10.81 per hour for a 40 hour work week.

Claimant's job duties as a court clerk consisted of collecting, retrieving and distributing the mail as well as other office duties. Claimant testified that her duties included periodically going to the post office to retrieve the daily mail. This job duty was split with several co-workers and the key was kept in the office so that each worker would have access to it. None of the workers were allowed to take the key home so each was

therefore required to report to work before going to pick up the mail. On the days that claimant was assigned to pick up the mail, she would report to work at her normal time, 8:00 a.m., prepare her work space, and at approximately 8:30 a.m. she would take the key and go to the post office.

On January 5, 2001, claimant elected to park on the east side of the building. This was not the place she normally parked, but the area allowed free parking for 30 minutes and she knew she would be returning shortly to drive to the post office. Moreover, this location placed her closer to the door, avoiding unnecessary walking in icy and snowy conditions. Shortly before 8:00 a.m. claimant got out of her car and began walking on the public sidewalk. After walking approximately 5 feet she fell on a icy patch and fractured her right ankle.

Claimant was taken to a hospital and treated. When claimant sought workers compensation benefits, her claim was denied. A preliminary hearing was held on June 20, 2001, and essentially all the same evidence referenced above was presented to the ALJ.[2]

In his June 21, 2001 Preliminary Hearing Order, Judge Frobish found that although the claimant sustained an injury to her right lower extremity on January 5, 2001, the injury did not arise out of and in the course of her employment with respondent. To come to his conclusion the ALJ referred to K.S.A. 44-508 (e),(f) which states:

> (e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.
>
> (f) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

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[2] This preliminary hearing was heard by Jon Frobish, the ALJ then serving in that position and assigned to this claim.

> The words, "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.

He opined that "[a]lthough an employee may be on the premises of another other than his employer, or in a public place, they may still be so close to the scene of their labor, within its zone, environments, and hazard as to be, in effect, at the place and under the protection of the act. The [c]ourt finds the [c]laimant was within the employer's zone of danger."[3] However, he went on to state that the icy conditions on the sidewalk where the claimant fell did not present a special risk or hazard related to the claimant's employer, and that she was no more exposed to a hazard than the general public, and so considered her injury a personal risk and denied claimant's request for benefits.[4]

At the regular hearing the SALJ concluded the claimant was in the course of her employment when she fell and awarded the claimant 23 weeks of temporary total disability compensation and a 20 percent impairment to the right ankle, based upon an average weekly wage of $459.15.[5] He also ordered the respondent to pay claimant's medical bills which, according to the itemization provided by her counsel, totaled $ 16,405.01.

The respondent contends the SALJ erred in finding this claim compensable. Distilled to its essence, respondent maintains this claim is precluded by the "going and coming rule" and does not fall within any of the recognized exceptions.

First, claimant was injured on premises that did not belong to, nor were they maintained by this respondent while she was walking to work. She was not on her employer's premises, nor had she yet reported to work. Like the injured employee in *Thompson*[6], this claimant was "merely on her way to work, an activity which the Kansas Legislature has made not compensable."[7]

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[3] ALJ Order (Jun. 21, 2006) at 2.

[4] *Id.*

[5] This wage is based upon an hourly rate of $10.81 per hour, 40 hours per week and includes an additional $26.75 for fringe benefits. Unfortunately, the record is silent on the date when those fringe benefits ceased to be paid. Thus, it is impossible to determine when the average weekly wage should be increased as required by K.S.A. 44-511. However, given the Board's decision on the underlying compensability, it is not necessary to address this evidentiary omission.

[6] *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 883 P.2d 768 (1994).

[7] *Id.* at 46.

Second, claimant does not fall within the "special risk or hazard" exception codified at K.S.A 44-508(f). That exception recognizes compensability of injuries that occur due to an employee's exposure to some sort of unique risk or hazard that would not otherwise exist but for the employment. Here, claimant was not required to park in the area where she did on the day she was injured nor was she compelled to walk on this sidewalk. Indeed, she chose this parking space and this route so as to minimize her travel on what she knew was icy and slick conditions. These were conditions that existed on the public sidewalks in the town where she worked.

The Board does not find claimant's citation to *Newman*[8] as persuasive authority that this claim should be found compensable. *Newman* involved a claimant who traveled from oil lease to oil lease for several difference lease owners. Mr. Newman was fatally injured as he was driving between leases. It was ultimately found that his injury was compensable because there is a certain risk or hazard inherent in the use of a public road and he was in his employer's service at the time of his accident.[9] It is worth noting that Mr. Newman had already begun working on the day he was injured and was not in the process of traveling *to* his first job for the day.

In this case, claimant was not injured while she was in a vehicle nor is there any claim that travel is an inherent part of her job. While it is true that claimant's decision to park where she did was due to her subsequent need to drive to the post office *for her employer*, she was not "on the clock" when she was injured, she fell on premises that were open to the public and not owned or maintained by her employer and she was not required to use this particular sidewalk to make her way to work.

The SALJ's conclusion that "this is not a coming and going rule because she had to pick up a key to get the mail" is not supported by the law as set forth above and must, therefore, be reversed.

The balance of the issues presented by the parties are rendered moot by the foregoing decision.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Marvin Appling dated May 10, 2006, is reversed and claimant is denied any benefits under the Workers Compensation Act. The SALJ's assessment of costs against respondent is, however, affirmed.

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[8] *Newman v. Bennett,* 212 Kan. 562, 512 P.2d 497 (1973).

[9] *Id.* at 569.

IT IS SO ORDERED.

Dated this _____ day of August, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Kala A. Spigarelli, Attorney for Claimant
William L. Phalen, Attorney for Respondent and its Insurance Carrier
Marvin Appling, Special Administrative Law Judge